



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 10, 2014

OAG-03-14

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, Third Floor
Madison, WI 53703

Dear Mr. Kennedy:

¶ 1. You have requested an opinion regarding the ability of the Government Accountability Board ("GAB") to provide investigative records that are confidential under Wis. Stat. § 12.13(5) to the Legislative Audit Bureau ("LAB") for purposes of an audit of GAB's operations as directed by the Joint Legislative Audit Committee.

¶ 2. I conclude that Wis. Stat. § 12.13(5) prohibits GAB from providing confidential investigative records to LAB for purposes of an audit of GAB's operations directed by the Joint Legislative Audit Committee. Wisconsin Stat. § 12.13(5) prohibits disclosure of GAB's investigative records except for disclosures that are "specifically authorized by law." I conclude that Wis. Stat. § 13.94, which provides that LAB "shall at all times and with or without notice have access to all departments and to any books, records, or other documents maintained by the department," is not a specific authorization that would permit GAB to disclose its confidential investigative records to LAB.

¶ 3. Wisconsin Stat. § 12.13(5) provides:

[e]xcept as *specifically* authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

Wis. Stat. § 12.13(5)(a) (emphasis added). A violation of this provision is punishable by a fine of up to \$10,000, imprisonment of up to 9 months, or both. Wis. Stat. § 12.60(1)(bm).

¶ 4. I begin with the plain language of the statute because “statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations and quotation marks omitted). In reviewing the plain language of the statute, the “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶ 46 (citations and quotation marks omitted). In addition, “[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.* Further, Wisconsin courts recognize that “exceptions should be strictly construed.” *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772, 777 (1991).

¶ 5. The use of the word “specifically” in Wis. Stat. § 12.13(5)(a) is significant because the Wisconsin statutes use the phrase “authorized by law” without the modifier “specifically,” including those related to confidentiality of documents. *See, e.g.*, Wis. Stat. § 977.09 (documents maintained by the office of the state public defender “shall not be open to inspection by any person unless authorized by law”). In order to give meaning to the word “specifically” in the phrase “specifically authorized by law,” courts recognize that the inclusion of “[t]he term ‘specifically’ indicates a legislative intent to require a certain degree of specificity or particularity in the authorization.” *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 38 (Ill. 2005).

¶ 6. There is nothing particular about LAB’s authorization to inspect records as it relates to accessing investigatory information. Wisconsin Stat. § 13.94 provides LAB with a general right to obtain documents from state departments like GAB. The statute provides that “the state auditor [the head of LAB] or designated employees shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by the departments and relating to their expenditures, revenues, operations and structure except as provided in sub. (4)[.]” Wis. Stat. § 13.94. Wisconsin Stat. § 13.94(4)(a) broadly defines “department” as “[e]very state department, board, examining board, affiliated credentialing board, commission, independent agency, council or office in the executive branch of state government; all bodies created by the legislature in the legislative or judicial branch of state government.” The statute does not specifically address the GAB, Wisconsin Stat. § 12.13(5), or even explicitly grant LAB the general right to obtain documents made confidential by other statutory sections. These general powers and duties do not satisfy a common, ordinary understanding of “specific[] authoriz[ation].”

¶ 7. Viewing the powers and duties of LAB in related statutory contexts confirms this conclusion. The legislature *has* provided specific authorization for LAB to obtain confidential information in other sections of the Wisconsin statutes. For example, Wis. Stat. § 71.78 prohibits the disclosure of information derived from tax returns except for a number of specific

exceptions, including one for disclosures to “[t]he state auditor and the employees of the legislative audit bureau to the extent necessary for the bureau to carry out its duties under s. 13.94.” Wis. Stat. § 71.78(4)(s). The legislature has also specifically authorized state agencies to disclose certain confidential information to other state agencies, which would include LAB. For example, information provided to the department of administration in an energy alert must be kept confidential, but such information “may be disclosed to agencies of the state or federal government, under the same or similar rules of confidentiality.” Wis. Stat. § 16.955. Similarly, the legislature provides for the confidentiality of certain information relating to veterans but recognizes an exception when the information is furnished for use “for official purposes . . . by any agency of this state . . .” Wis. Stat. § 45.04(8). These statutory provisions demonstrate the type of specific authorizations that would satisfy Wis. Stat. § 12.13(5).

¶ 8. The fact that the legislature specifically authorized GAB to disclose investigatory information to entities other than LAB and for purposes other than auditing further confirms that the legislature did not intend to give the LAB access to this investigatory information. Wisconsin Stat. § 12.13(5)(b) carves out the multiple exceptions to the prohibition against disclosing investigatory information. GAB has a privilege to disclose the investigatory information “in the normal course of an investigation or prosecution,” the privilege to disclose the investigatory information to any “local, state, or federal law enforcement or prosecutorial authority,” and the privilege to disclose the investigatory information to a subject of the investigation, the subject’s attorney, and the board’s attorney. Wis. Stat. § 12.13(5)(b)1.-3.

¶ 9. In addition, Wis. Stat. § 5.05(5s) authorizes others to inspect certain GAB records relating to investigations in other contexts. These include materials considered by the GAB in open session; records made public in the course of a prosecution that results from a GAB investigation; and all investigatory records pertaining to a person whom GAB is prosecuting in a civil enforcement action and who has asked GAB to make those records available. Wis. Stat. § 5.05(5s)(a), (b) & (d). GAB must also provide to the Department of Children and Families and county child support agencies “all investigative and hearing records that pertain[] to the location of individuals and assets of individuals” as those entities carry out certain statutory administrative duties relating to public assistance and child support programs. Wis. Stat. § 5.05(5s)(c). Moreover, Wis. Stat. § 5.05(5s)(e) authorizes certain investigatory records to be available for inspection under the public records law: any record of an action of the board authorizing the filing of a civil complaint; any record of an action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution; any record containing a finding that a complaint does not establish reasonable suspicion that a violation of law has occurred; and any record containing a post-investigation finding that no probable cause exists to believe that a violation of the law has occurred.

¶ 10. In sum, the legislature created numerous specific instances in which GAB must produce generally confidential investigative records, but it did not do so with respect to LAB.

¶ 11. Finally, the Legislature emphasized the importance of the confidentiality provision not only by mandating that any disclosures be specifically authorized, but also by imposing criminal penalties for any unauthorized disclosures. Other state courts recognize that “[b]y mandating a criminal penalty when a state employee violates the confidentiality requirements . . . , the Legislature emphasized the importance of the confidentiality provisions.” *Daily Gazette Co., Inc. v. Caryl*, 380 S.E.2d 209, 213 (W. Va. 1989). By imposing criminal penalties for a violation of Wis. Stat. § 12.13(5), the legislature emphasized the confidentiality of GAB’s investigative records even more than in most other statutes addressing confidentiality. It is hard to imagine a more powerful way of saying “and we really mean what we say about confidentiality” than imposing criminal penalties for improper disclosure.

¶ 12. I recognize that opinions from my predecessors have recognized the LAB’s power to access records in other contexts. But these opinions are easily distinguishable. Both the specific language of Wis. Stat. § 12.13(5) and its imposition of criminal penalties distinguish this issue from prior opinions of the attorney general relied upon by LAB. The first opinion, 74 Op. Att’y Gen. 14 (1985), examined whether a department could withhold a settlement agreement from LAB based on a contractual pledge of confidentiality and concluded that Wis. Stat. § 13.94 would permit LAB to access those documents. The opinion reasoned that “[t]he nature of the state auditor’s role is such that he or she must have access to all pertinent records including those that may otherwise be confidential.” 74 Op. Att’y Gen. at 17. While this opinion correctly interprets the law with respect to documents made confidential by contract, it does not determine whether LAB may have access to documents made confidential by statute. That question must be determined by the language of the statute at issue, and, as examined above, Wis. Stat. § 12.13(5) requires more for disclosure than a general policy that LAB should have access to confidential documents.

¶ 13. The second opinion, 57 Op. Att’y Gen. 187 (1968), also does not apply. In that opinion, the Attorney General concluded that the state health officer could share the identity of individuals who died in automobile accidents with the Department of Transportation for use in the study of alcohol as a cause of motor vehicle accidents. The Wisconsin statute at issue directed the state board of health to keep a record of the blood alcohol content of persons who died in automobile accidents to be used for statistical purposes only, and provided that the board would disclose the cumulative results to the public, but without identifying the individuals. 57 Op. Att’y Gen. at 188-89. The statute allowed the state board of health to keep the records for statistical purposes and did not affirmatively prohibit disclosure to another state agency; it merely prohibited the disclosure of the identities to the public. *See id.* The opinion reasoned that the identity of the individuals could be shared because, while this information was to be kept confidential from the general public, it “does not mean that such records may not be made available for proper purposes to other officers of government.” *Id.* at 189. This reasoning cannot be applied here because Wis. Stat. § 12.13(5) explicitly prohibits disclosure of confidential investigatory information unless it has been “specifically authorized by law” and imposes criminal penalties including a prison sentence and/or a substantial fine. Moreover, the

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legislature specifically authorized some government entities to have access to these records for certain purposes (for example, prosecutors, law enforcement, the Department of Children and Families); the Legislature's silence as to other government entities is indicative of an intent for confidentiality to apply to those other government entities.

¶ 14. I conclude that Wis. Stat. § 12.13(5) prevents GAB from providing its investigative records to LAB because such a disclosure is not "specifically authorized by law."

Sincerely,

J.B. VAN HOLLEN
Attorney General

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